Supreme Court, U.S.
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No. 02-

IN THE

Supreme Court of the United States

BRIAN MARTIN, Individually and as the Administrator of the Estate of Norma Martin, deceased,

Petitioner,

v.

ARKANSAS BLUE CROSS AND BLUE SHIELD, a Mutual Insurance Company,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In some jurisdictions ERISA participants who have been wrongfully denied medical benefits and are the prevailing party in a lawsuit are not given the presumption of awarding attorney fees. In other circuits the presumption is still adhered to, while in other circuits they have adopted a test where they apply factors to be weighed. In the circumstances where an ERISA participant is not awarded attorney fees they face the grim situation of having to find the compensation for their counsel. This can be very difficult due to the fact that the award they have just received from the suit is not a monetary award. The fact that there is no unified standard for awarding attorney fees to a prevailing plaintiff in an ERISA case makes it difficult for a party seeking representation to asses whether they have ample means for adequate representation. Without the means of seeking adequate representation the judicial system is lacking in one of its most important roles, that of due process.

The question presented is whether there should be a presumption of awarding attorney fees to the prevailing plaintiff in ERISA cases involving the wrongful denial of medically necessary treatment?

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Contents	ii
Table of Cited Authorities	iii
Table of Appendices	v
Opinions Below	1
Jurisdictional Statement	1
Statute Involved	2
Statement of the Case	2
Reasons for Granting the Petition	3
There is a split in the circuits that threatens the uniformity of the provisions set forth in ERISA cases that allows the court to award attorney fees to the prevailing party and that could have an adverse affect for an ERISA participant who seeks non-monetary benefits	3
Conclusion	7

TABLE OF CITED AUTHORITIES

Page

Cases:

Central States, Southeast and Southwest Areas Pension Fund v. Hunt Truck Lines, 272 F.3d 1000 (7th Cir. 2001) 4

Chambless v. Masters, Mates & Pilots Pension Plan, 815 F.2d 869 (2d Cir. 1987) 4

Cottrill v. Sparrow, Johnson & Ursillo, Inc., 100 F.3d 220 (1st Cir. 1996) 3

Eddy v. Colonial Life Ins. Co. of Am., 59 F.3d 201 (D.C. Cir. 1995) 3

Ellison v. Shenango Inc. Pension Bd., 956 F.2d 1268 (3d Cir. 1992) 3

Foltice v. Guardsman Products, Inc., 98 F.3d 933 (6th Cir. 1996) 4

Gonzales v. Transfer Technologies, Inc., 301 F.3d 608 (7th Cir. 2002) 4, 5

Gordon v. United States Steel Corp., 724 F.2d 106 (10th Cir. 1983) 4

Iron Workers Local No. 272 v. Bowen, 624 F.2d 1255 (5th Cir. 1980) 4

Cited Authorities

	Page
Lawrence v. Westerhaus, 749 F.2d 494 (8th Cir. 1984)	4
Martin v. Blue Cross and Blue Shield, 299 F.3d 966 (8th Cir. 2002)	4
McElwaine v. US West, Inc., 176 F.3d 1167 (9th Cir. 1999)	4
Perez-Arellano v. Smith, 279 F.3d 791 (9th Cir. 2002)	6
Quesinberry v. Life Ins. Co. of N. Am., 987 F.2d 1017 (4th Cir. 1993)	3-4
Wright v. Hanna Steel Corp., 270 F.3d 1336 (11th Cir. 2001)	4
Statutes:	
17 U.S.C. § 505	4
28 U.S.C. § 1254	1
28 U.S.C. § 1291	1
28 U.S.C. § 2412(d)	6
28 U.S.C. § 1331	1
29 U.S.C. § 1001, *et seq.*	1
29 U.S.C. § 1001(b)	3
29 U.S.C. § 1132(g)(1)	2

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The United States Court Of Appeals For The Eighth Circuit Dated And Filed August 16, 2002 ..... 1a

Appendix B — Judgment And Memorandum Opinion Of The United States District Court For The Western District Of Arkansas, Fayetteville Division Dated And Filed June 6, 2000 ..... 16a

Plaintiff respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit, which affirmed the decision of the district court, on August 16, 2002, so that this Court might resolve the issue of whether there should be a presumption of awarding attorney fees in ERISA cases. There is a compelling reasons for review: the strong Congressional desire for national uniformity in enacting the Employee Retirement Income Security Act (ERISA), a goal often expressed by this Court in ERISA decisions.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit, rendered August 16, 2002, is reported at 299 F.3d 966 (8th Cir. 2002), and is reprinted in the appendix hereto as Appendix A at 1a. The order of the United States District Court for the Western District of Arkansas, issued September 5, 2000 is reprinted in Appendix B at 16a.

JURISDICTIONAL STATEMENT

The district court had jurisdiction of this action pursuant to 28 U.S.C. § 1331 as applying the Employee Retirement Income Security Act of 1971 ("ERISA"), 29 U.S.C. § 1001, *et seq.*, pre-empts all state law claims and presents a federal question. The district court denied the plaintiff/petitioner's motion for attorney's fees.

An appeal was taken to the Eighth Circuit Court of Appeals pursuant to 28 U.S.C. § 1291. The judgment of the court of appeals was entered August 16, 2002.

The Jurisdiction of this court is invoked pursuant to 28 U.S.C. § 1254.

STATUTE INVOLVED

The Employee Retirement Income Security Act of 1974 ("ERISA") 29 U.S.C. § 1132(g)(1) provide:

> § 1132(g) Attorney's fees and costs; awards in actions involving delinquent contributions
>
> (g)(1) In any action under this subchapter (other than an action described in paragraph (2)) by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.

STATEMENT OF THE CASE

The petitioner Norma Martin was an employee of Washington Regional Medical Center and as an employee of Washington Regional Medical Center was insured by an Arkansas BlueCross BlueShield welfare benefit plan. By virtue of Norma Martin's employment by Washington County Regional Medical Center, Norma Martin was a subscriber of and entitled to medical care under the plan. The plan provided coverage for all medically necessary medical and hospital services. Norma Martin was diagnosed as suffering from recurrent bronchoalveolar cell carcinoma (BAC) of the lung. Norma Martin's physician, Irvin Paradis, M.D. recommended that she have a lung transplant. All of Norma Martin's treating physicians agreed the transplant would be advantageous and that Norma Martin was in a desperate battle for her life. Arkansas BlueCross BlueShield was notified of the recommendation that Norma Martin have a lung transplant. Arkansas BlueCross BlueShield denied coverage based on the experimental/investigational exclusion

of the plan. The District Court found against Arkansas BlueCross BlueShield and ordered it to provide for the lung transplant. BlueCross BlueShield did not appeal and subsequently provided the lung transplant, however the court refused to award the plaintiff any attorney fees, primarily because Blue Cross and Blue Shield elected not to appeal.

REASONS FOR GRANTING THE PETITION

There is a split in the circuits that threatens the uniformity of the provisions set forth in ERISA cases that allows the court to award attorney fees to the prevailing party and that could have an adverse affect for an ERISA participant who seeks non-monetary benefits

This case is compelling for review and resolution by this Court. In an ERISA case involving a health benefit plan, a prevailing plaintiff obtains no monetary recovery; only the health benefits providers receive monies. Contingency agreements would be meaningless. Fee shifting is the only means for a plaintiff's attorney to be paid. A participant in need of treatment cannot obtain the ready access Congress intended, 29 U.S.C. § 1001(b).

The circuits that have addressed the issue have an irreconcilable split in their decisions regarding a presumption that the prevailing party be awarded attorney fees in ERISA cases. The First, Third, Fourth, Fifth, Sixth, Eleventh, and D.C. circuits have all rejected the presumption of the prevailing plan participant. *Eddy v. Colonial Life Ins. Co. of Am.*, 59 F.3d 201 (D.C. Cir. 1995); *Cottrill v. Sparrow, Johnson & Ursillo, Inc.*, 100 F.3d 220 (1st Cir. 1996); *Ellison v. Shenango Inc. Pension Bd.*, 956 F.2d 1268 (3d Cir. 1992); *Quesinberry v. Life Ins. Co. of N. Am.*, 987 F.2d 1017

(4th Cir. 1993); *Iron Workers Local No. 272 v. Bowen*, 624 F.2d 1255 (5th Cir. 1980); *Foltice v. Guardsman Products, Inc.*, 98 F.3d 933 (6th Cir. 1996); *Wright v. Hanna Steel Corp.*, 270 F.3d 1336 (11th Cir. 2001). The Eight Circuit also rejected it in the present case. *Martin v. Blue Cross and Blue Shield*, 299 F.3d 966 (8th Cir. 2002). The Seventh and Ninth circuits still adhere to a presumption, but also apply a five-factor test. *McElwaine v. US West, Inc.*, 176 F.3d 1167 (9th Cir. 1999); *Central States, Southeast and Southwest Areas Pension Fund v. Hunt Truck Lines*, 272 F.3d 1000 (7th Cir. 2001). The Second and Tenth circuits have not rejected the presumption. *Chambless v. Masters, Mates & Pilots Pension Plan*, 815 F.2d 869 (2d Cir. 1987); *Gordon v. United States Steel Corp.*, 724 F.2d 106 (10th Cir. 1983).

The courts that reject the presumption in favor of fees have adopted a somewhat varied five-factor test. The five factors are set out in *Lawrence v. Westerhaus*, 749 F.2d 494 (8th Cir. 1984).[1] The current decision makes the factors less certain. In the instant case the court reasoned that the ERISA statute is closely similar to the Copyright Acts fee-shifting provision, 17 U.S.C. § 505. There is no unitary standard that applies to prevailing parties in copyright suits, but there are factors to guide determination that the Eighth Circuit seemingly would not apply. Compare with *Gonzales v. Transfer Technologies, Inc.*, 301 F.3d 608 (7th Cir. 2002).

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1. The five factors are: (1) the degree of the opposing parties culpability or bad faith; (2) the ability of the opposing parties to satisfy an award of attorney's fees; (3) whether an award of attorney's fees against the opposing parties could deter other persons acting under similar circumstances; (4) whether the parties requesting attorney's fees sought to benefit all participants and beneficiaries of an ERISA plan or to resolve a significant legal question regarding ERISA itself; (5) the relative merits of the parties' positions.

A factor the *Gonzales* court considered was the advance consideration of compensation and deterrence. *Id.* It would not be sufficient that the wrongdoer said he would not appeal, as happened in the instant case, Judge Posner likened such conduct to a criminal saying he would not appeal a criminal conviction, while the Eighth circuit thought such conduct sufficiently commendable to affirm the district court relieving the wrongdoer from paying fees.

The Copyright Act as well as the ERISA statute, so the Eighth Circuit now says, were created to protect economic rights. The infringement in *Gonzales* was willful, and willful infringement usually involves small amounts of money, and the infringements cannot be deterred without an award of attorney fees. *Id.* at 610. If attorney fees are not allowed in these types of cases this would allow minor infringements, that are willful, to be in effect privileged and immune from legal address. *Id.* at 610. Just as a willful copyright infringement deserves deterrence so to does an abuse that an ERISA participant receives when being denied a valid claim that has no monetary value. This is especially true in a claim for non-monetary relief as in Norma Martin's claim for a lung transplant. The fact that Congress recognizes the need to deter certain activities of defendants under ERISA provisions illustrates the importance of awarding attorney fees in statutes that protect economic interests even absent the requirements of the prevailing party statutes. The protection should be afforded to ERISA participants who are being unfairly denied benefits by insurance companies before adjudication.

The result of a fee-shifting statute is to enable a party denied benefits with no other compensation to hire competent counsel to represent them. Statutes that do not mandate an

award of attorney fees to the prevailing party already exert a deterrent effect on attorneys pursuing ERISA cases. This especially will be seen in cases where the relief sought is not monetary relief. In these types of cases there is no monetary award available to the prevailing plaintiff to compensate her attorney. This will have the effect of numerous competent attorneys declining to represent ERISA participants and result in a wrong without a remedy. It will effectively deny access to the courtroom for those who can least afford to pay. If a party does not have access to effective legal counsel the judicial system has failed its purpose in the due process system.

In considering whether a fee-shifting presumption should apply to prevailing ERISA plaintiffs the court should look at other similar statutes that require a prevailing plaintiff to be awarded attorney fees. The Equal Access to Justice Act (EAJA) has been interpreted to provide that a court shall award to a prevailing party . . . fees . . . unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust. *Perez-Arellano v. Smith*, 279 F.3d 791 (9th Cir. 2002). Quoting 28 U.S.C. § 2412(d). The fee-shifting statutes that create a presumption clearly demonstrate the goals Congress intended them to have, one for deterrence and just compensation for the prevailing plaintiff and counsel, and another for unified access to the courtroom. Only by way of a presumption can "ready access" be achieved. The question and differences amongst the courts of appeal merit resolution by this court at a time where there is a health care crisis as it is in our national delivery system as witnessed in earlier decisions by this court.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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